CHONG AH KWEE & ORS.

v.

VIVA REALITY PTE LTD.

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[SUIT NO. 1660 OF 1985]
19 MARCH 1990

CONTRACT: *Sale and purchase of flat - Flat having smaller area than that stated in the agreement - Claim for abatement of purchase price - Effect of r. 17 of the Housing Developers Rules 1976 vis-a-vis original and substituted purchaser - Novation of sale agreement. Effect of assignment between original and substituted purchaser. Whether substituted purchaser can sue under original agreement. Condition 11 of Singapore Law Society's Conditions of Sale 1981 - Construction of - Ingredients of claim under. Whether the misdescription of area was a serious/vital error or whether it affects value of flat - Whether misdescription was breach of warranty - Defence that description merely "estimation". - Estimation - Whether warranty? - Method of assessment of damages and calculation of abatement - Defence of waiver - question of fact.*

The plaintiffs purchased a flat from another party who had prior to that purchased the same from the defendant. An assignment of all rights, title and interests was executed between the plaintiffs and the third parties. Thereafter and as required by law, the plaintiffs signed a fresh sale agreement with the defendant.

In all the agreements, the flat was described as being 2,100 sq ft. At the time of completion of the flat in August 1984, the plaintiffs discovered for the first time, that the final surveyed area of the flat was only 1,753.88 sq. ft or 16.47% short of the contractual area of the same.

The plaintiffs' solicitors then wrote to the defendant claiming the sum of $70,023.90 (i.e., 16.47% of the sale price of $425,000) and requesting that the same be deducted from the balance purchase then yet to be paid. The defendant's solicitors replied stating that no claims shall be entertained as the purchase price of the flats were worked out on a unit to unit basis and not on a square feet basis. The plaintiffs then attempted to complete without prejudice to their claim for abatement but the defendants refused to complete on these terms. The defendant then replied stating that the plaintiffs could either complete the sale and purchase agreement or apply for rescission. The plaintiff's solicitors then replied stating that "rescission" would therefore mean that the defendant would "repurchase" the apartment for the same price but the defendant refused. The defendant purely stated that the plaintiffs should either complete the sale by making full payment failing which the plaintiffs would be deemed to have repudiated the agreement. The plaintiffs paid under protest and commenced this action for abatement of the purchase price on the ground of shortfall of the area of the flat.

The issue is whether the shortfall of 16.47% of the contractual area is a compensable shortfall under the terms of the agreement (which incorporated the Singapore Law Society's Conditions of Sale 1981 ("the conditions")) and if so how should this compensation be calculated.

Condition 11 of the conditions *inter-alia* provided that if any error, mis-statement or omission (not of a serious or vital nature nor considerably affecting the value of the property) shall be discovered ... the same shall not annul the sale nor shall any compensation be allowed.

The plaintiffs contended that they are entitled under the said condition 11 to compensation on the ground that there was a serious misdescription of the area and/or that it affects considerably the value of the flat and that compensation should be a proportionate abatement of the purchase price. The plaintiffs further stated that they purchased the flat by reference to its price on a per square foot basis.

The defendants contended that:

(a) there was no breach or contract/warranty as the description of the flat in the agreement had stated that the defendant's estimate of the area was 2,100 sq ft. and the defendant contended that it had made such estimation on a *bona fide* basis. Hence, based on the decision of *Joliffe v. Baker*, no compensation was payable. In this decision, the land purchased was described as "in all three acres" and the language of the contract and the conveyance described the area of the property as a real genuine estimate. It was subsequently found out after completion that the land was 2a 1r 12p. The Court held that compensation could not be recovered for the shortfall unless there was fraud or breach of contract/warranty and there was none;

(b) that the plaintiffs is completing the purchase had waived their rights to compensation. Based on *Yeo Brothers Co. (Pte.) Ltd. v. Atlas Properties (Pte.) Ltd.*, the plaintiffs had to apply to the Court for relief before completion. The defendant contended that no action for breach could be brought after completion, for then, the contract merges into the conveyance and the misdescription cannot survive the completion as the defendant could only transfer what they originally had and the plaintiffs, after taking what the defendant had, cannot now say that the contractual obligation is capable of fulfillment after completion;

(c) there was no loss suffered as plaintiffs had completed subpurchase - this is due to the purchaser completing the sale and purchase agreement between the defendant and the original purchaser of the flat. Any loss therefore suffered is as a result of the subsale and not the result of the agreement between the plaintiffs and the defendant. Hence, there was no causal link;

(d) Condition 11 was fulfilled as the market value of the flat of lesser area was $425,000 - hence the misdescription was not serious and/or did not affect the value of the flat. The defendant also contended that based on the decision of *Yeo Brothers* the plaintiffs must show:

(i) serious/vital misdescription; and

(ii) considerably affecting the value of the property before condition 11 can be invoked; and

(e) that the plaintiff's claim should be for difference between market value of a flat of the larger area and the market value of smaller one - the defendant contended that as the market value of the smaller area was also around $420,000 the misdescription did not affect the value of the flat and that the plaintiffs are otherwise not entitled to damages.

Held:

[1] On contention (a) - Distinguishing *Joliffe v. Baker* as there was no clause alike condition 11 in that case and following *Rudd v. Lascelles*, compensation is part of the bargain between the parties. "Estimate" in itself is a warranty - the question then is whether the defendant had made a genuine or *bona fide* "estimation". The evidence showed that the defendant had made such an estimation recklessly, without regard to the truth or, if done deliberately, deceitful as the calculation was fraudulent. It would appear that in the "estimation" made by

the defendant, the defendant had included part of the common area into the builtup area. Common areas do not form part of the built-up area of a flat in a condominium development and the defendant must or ought to have known of this. It was fraudulent to include these areas.

[2] Condition 11 therefore means that if the defendant has estimated the area and a mistake is discovered, the plaintiffs are not entitled to annul the sale or seek compensation unless the misdescription has resulted in a misdescription which is a serious/vital nature or effects the value of the flat.

[3] Even if the defendant had made a *bona fide* mistake in the estimation, the plaintiffs are entitled to compensation and such compensation should be either for damages based on breach of warranty or abatement under condition 11. Following *Cordingly v. Cheeseborough*, if there is a doubt as to the ambit of the defendant's warranty, it would be construed in favour of the purchaser. Further, it is not necessary to show that the error or misdescription amounts to a warranty before a rights of compensation arises.

[4] The defendant's contention as per (b) must fail as:

(i) the defendants did not offer the plaintiffs rescission with full refund;

(ii) the decision in *Yeo Brothers* did not recognise and could not have recognised the principle that the application for relief must be made before completion - due to the presence of condition 11 (not present in *Yeo Brothers*, the considerations would differ;

(iii) following *Rutherford v. Acton-Adams* (Privy Council), equity has allowed the purchaser to take what the vendor can give with compensation for errors and misdescriptions subject to no unacceptable hardship being inflicted on the defendants by reason of such compensation - the purchaser may elect to take all he can get, and to have a proportionate abatement from the purchase price. This right applies only to a deficiency in the subject-matter described in the contract;

(iv) distinguishing *Joliffe v. Baker and Clayton v. Leach*, there is no compensation clause (alike condition 11) in those cases. The plaintiff is entitled to claim compensation unless there is waiver. Waiver is a question of fact and sometimes of law. Here the intention of the plaintiffs is very clear - they decided to complete after reserving their rights to claim an abatement after completion; the intention of the defendant on the other hand is wholly irrelevant, as in law, they were not entitled to force the plaintiffs to complete without offering abatement. There was therefore no waiver; and

(v) The doctrine of merger cannot apply unless the parties intended the same or the same is a requirement of law. Where a party has reserved his claim, there is no justification for a rule of law that he must determine his claim first before completing his purchase. It would be unjust to apply such a rule in this type of situation as inevitably the purchaser would never be able to obtain his relief in time to allow him to complete without abatement if he fails in his application.

[5] The defendant's contention as per (c) must fail as the plaintiffs' rights was derived from the assignment. By r. 17 of the Housing Developers Rules 1976-81, the sale agreement did nothing more than to substitute the plaintiffs as the original purchaser - there was in fact a novation.

[6] The defendant's contention as per (d) must fail. *Yeo Brothers* decided that in that case the misdescription was both serious/vital and considerably affected its value. Condition 11 in its ordinary constructions, means that neither party shall be entitled to compensation for

any misdescription if it is **neither** of a serious/vital nature **nor** considerably affecting the value of the same. Accordingly if it is one or the other, then either party is entitled to compensation. If the words "serious" and "vital" describe different conditions, then the fulfilment of any one of the three conditions entitles the relevant party to compensation. It depends on the nature of the error or misdescription.

[7] In the context of Singapore, a shortfall of 16.47% of the built-up area of a flat is both of a serious nature and considerably affecting the value of the property.

[8] The defendant's contention as per (e) is firstly one of fact and then a one of mixed fact and law. As the defendants had included the areas of the flats in their price lists, it must be presumed that the defendants have fixed the prices of the flats having regard to the areas of the same. Further, the defendants being real estate developers must know whether the prices they are offering are within the market prices for which the price per sq. ft. is relevant. The defendant's unilateral statement of intention that they included the areas in the price list because they had to, is insufficient to rebut the presumption against them.

[9] Following *S.N. Aswani v. Collector of Land Revenue* the best evidence of the market value of a property is the price at which it is actually sold and not what the valuer says or thinks it should be sold. The evidence shows that the market value of the flat as at November 1982 was $425,000. The evidence of the expert valuer called by the defendant does not assist the Court as there was not in existence a willing buyer and a willing seller for a flat in the same apartment block for the smaller area at the material time. The original purchasers of this flat were the willing seller of a flat of the larger area and the plaintiffs here are the willing buyers.

[10] The purchaser here is entitled to be put in nearly as possible into the position he would have enjoyed had he obtained the land contracted to be sold without the error or misdescription. Following *Owmist Pty. Ltd. v. Twtwan Pastoral Co. Pte. Ltd., Hill v. Buckley and Mckenzie v. Hesketh* the compensation awarded should be by way of proportionate abatement.

[11] When a developer sells a flat, he is selling living space. Every square foot counts to a purchaser as that is what he is buying. It is true that there is authority for the proposition that proportionate abatement is not strictly appropriate where there are different values upon some parts of the property than upon others. In the absence of evidence, the Court has to apply a rateable abatement.

[Judgment for the plaintiffs in the sum of $70,023.80 by way of proportionate abatement on the purchase price of $425,000 with interest thereon at 6% per annum from the date of completion up today and costs to be taxed.]

Cases referred to:
Yeo Brothers Co. (Pte.) Ltd. v. Atlas Properties (Pte.) Ltd. [1988] 1 MLJ 150
Joliffe v. Baker [1883] 11 QBD 255
Rudd v. Lascelles [1900] 1 Ch 815
Cordingley v. Cheeseborough [1862] 45 ER 1230
Clayton v. Leach [1889] 41 Ch D 103
Rutherford v. Acton-Adams [1915] AC 866
Palmer v. Johnson [1884] 13 QBD 351
Bos v. Helsham [1866] LR 2 Ex 72
Sykes v. Midland Bank Executor and Trustee Co. Ltd. [1971] 1 QB 113
Re Elphick and Gaw [1930] SSLR 199

S.N. Aswani v. Collector of Land Revenue [1982] 2 MLJ 104
Ownist Pty. Ltd. v. Twyman Pastoral Co. Pty. Ltd. [1983] 3 NSWLR 196
Hill v. Buckley [1811] 17 Ves 394
McKenzie v. Hesketh [1977] 7 Ch D 675

Legislation referred to:
Housing Developers Rules 1976 [Sing], r. 17

For the plaintiffs - Cheong Yuen Hee, (Terence Teo & Tommy Ho with him)
For the defendants - G. Newman, QC, (Cheng Tim Pin & Lo Wai Pin with him)

JUDGMENT

Chan Sek Keong J:

This action was commenced in February 1985 as an action for rescission of a sale and purchase agreement of a flat ("the flat") known as Unit #05-02, Prince Apartments, Jalan Datoh, Singapore on the ground of fraudulent misrepresentation in relation to the area of the flat and for other consequential reliefs. The defence and counterclaim was filed in March 1985 and amended in August 1985. The reply and defence to counterclaim was filed in September 1985 and the further amended defence and counterclaim was filed in May 1986. In July 1986, the amended reply and defence to counterclaim was filed. In October 1989, the statement of claim was amended to include an alternative allegation of negligent misrepresentation and a claim for an abatement of the purchase price on the ground of a shortfall in the area of the flat purchased by the plaintiffs. In consequence, the defendants filed their reamended defence and counterclaim some days later. On the date of hearing, the plaintiffs, with the consent of the defendants, served a reamended reply and defence to counterclaim. At the trial, the parties agreed to have only one issue tried, and that is whether the plaintiffs are entitled to compensation on the purchase price of the flat for the shortfall in its area. It has also been agreed by Counsel for the relevant parties in the other ten consolidated actions that the outcome of this action will also determine the results of those actions where similar claims have been made against the defendants in connection with other flats in Prince Apartments.

The defendants were the developers of the block of flats called Prince Apartments. By an agreement for sale dated 10 November 1982, they agreed to sell the flat to Teo Thian Hock and Lee Lak Nia ("the original purchasers") at the price of $425,000. The agreement for sale was in the form prescribed under The Housing Developers Rules 1976 and described the flat in the First Schedule thereof as "All that flat ... estimated to contain a floor area of 195.2 square metres (2100 square feet) ...". On 15 September 1983, the original purchasers gave an option in writing to the plaintiffs to purchase the flat (as described in the agreement for sale) at the price of $460,000. The option was exercised on the same day.

In accordance with r. 17 of the Housing Developers Rules 1976 as amended in 198l (see No.S 239/81) , the defendants agreed to enter into a fresh agreement for sale with the plaintiffs provided certain conditions were fulfilled, i.e., *inter alia*, that the plaintiffs furnish a stamped deed of assignment, a letter of authority and the surrender of the original agreement of sale for cancellation. All the conditions were duly complied, with, as a result of which the defendants, as vendors, and the plaintiffs, as purchasers, entered into a fresh agreement for sale dated 21 January 1984 ("the sale agreement"). By the deed of assignment dated 9 January 1984 and made between the original purchasers and the plaintiffs, the former assigned to the latter all their "rights title and interest benefits advantages permits licences and remedies of the assignors in the agreement of sale".

At the time of completion in August 1984, the plaintiffs discovered for the first time that the final surveyed area of the flat was only 163 sq m (about 1753.88 sq ft) or 16.47% short of contractual area. On 6 August 1984, the plaintiffs' solicitors wrote to the defendants' solicitors claiming the sum of $70,023.80 (being 16.47% of the purchase price of $425,000) and requesting the same be deducted from the balance due on completion. The defendants' solicitors replied on 10 August 1984 rejecting the request on the ground that the purchase price was calculated on a unit basis and not on an area basis. The plaintiffs attempted to complete on 14 August 1984 without prejudice to their claim for abatement, but the defendants refused to complete. The defendants' solicitors ended their letter dated 14 August 1984 with the following sentence: "Your clients may wish to complete the purchase or rescind the contract." In their letter of the same date, the plaintiffs' solicitors placed on record that the solicitor for the defendants was of the view that the plaintiffs either complete or "commence action to nullify the agreement for sale and purchase". On 16 August 1984, the defendants' solicitors replied and stated, *inter alia*, "If you do not proceed with completion of the purchase, our clients will treat that your clients have breached contract, and or there is a rescission of the contract". The plaintiffs' solicitors protested on 17 August 1984 at being compelled to complete on terms that the plaintiffs would waive their claim for compensation. On 22 August 1984 the defendants' solicitors gave notice that if the purchase were not completed within 7 days thereof, their clients would treat the plaintiffs as having "breached or rescinded the contract." On 28 August 1984, the plaintiffs paid the balance of the purchase price.

On 13 September 1984 the solicitors for the plaintiffs wrote to the defendants' solicitors giving notice that they had instruction to commence proceedings on behalf of 13 purchasers of flats (including the plaintiffs) in Prince Apartments and sought the agreement of the solicitors for the defendants on two issues: (1) that one case be treated as a test case, and (2) that the area stated in the Subsidiary Certificates of Title be treated as the conclusive area so that no further resurvey would be necessary. On 19 September 1984, the solicitors rejected the approach and stated that "if your clients do not wish to proceed with the purchase, for any reasons, our clients will agree to any rescission of the contract". On 11 October 1984, the plaintiffs' solicitors understood this offer to mean that the defendants were prepared to take back the flats at their original purchase prices and so on 11 October 1984, they replied that all the 13 purchasers accepted the defendants' offer to "re-purchase" the units at those prices, subject to tenancies where applicable. On 16 October 1984, the defendants' solicitors replied to the said letter as follows:

> We thank you for your letter dated 11 October 1984 on which we are taking our clients' instructions.
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> Meanwhile, we repeat the following:
>
> (1) there is no ground for rescission of the contract;
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> (2) there is no provision for adjustment of the contractual price; and
>
> (3) the areas of the properties stated in the contracts are gross and are in accord with our clients' surveyors' survey.

On 5 November 1984, the solicitors for the defendants confirmed that their clients did not wish to re-purchase the flats but would accept "a rescission of the contract".

I have recounted in some detail the events leading up to the completion as it serves to put into its correct perspective one of the elements in the defence that the plaintiffs have waived their rights by completing and refusing the defendants' offer of "rescission". Reading the exchange of letters as a whole, it is clear to me that the words "You may wish in the defendants' letter of 14 August 1984 were not words of offer but were words indicating that

the plaintiffs had the choice of completing the contract or "rescinding" the contract **without** the consent of the defendants. That this was the meaning of those words was confirmed by the subsequent letters and conduct of the defendants. Any offer of rescission from the defendants which could make commercial sense was one on terms of a full refund of the original price which was what the plaintiffs were prepared to accept. The defendants never made this kind of offer. They rejected the acceptance of the defendants' offer to "re-purchase" which, in substance, had the same effect of a consensual rescission with full refund of the purchase price. In my view, the plaintiffs were given a Hobson's choice: either complete on the defendants' terms or be treated as having rescinded (i.e., repudiated) the sale agreement. The defendants' stance at the date of completion is also an important factor to be considered in relation to the defendants' defence based on the market value of the flat.

Issue

The issue before the Court is whether the shortfall of 16.47% of the contractual area is a compensateable shortfall under the terms of the sale agreement and if so, how the compensation should be calculated. The sale agreement incorporated the Singapore Law Society's Conditions of Sale 1981, condition 11 of which provided:

> The property is believed and shall be taken to be correctly described as to quantity and otherwise and is sold subject to all chief, quit, and other rents and out-going and to all incidents of tenure, rights of way, and other rights and easements (if any) affecting the same and if any error, misstatement, or omission (**not of a serious or vital nature nor considerably affecting the value of the property**) shall be discovered in the particulars special conditions or contract the same shall not annul the sale nor shall any compensation be allowed by or to either party in respect thereof. (Emphasis is mine)

The plaintiffs' case is that they are entitled to compensation under condition 11 on the ground that the misdescription of the area is of a serious nature and/or it affects considerably the value of the flat, and that the compensation should be calculated by way of a proportionate abatement of the purchase price.

Counsel referred to a number of well known English authorities on compensation provisions similar to condition 11 and also to the decision of Lai J in *Yeo Brothers Co. (PTE) Ltd. v. Atlas Properties (Pte) Ltd.* [1988] 1 MLJ 150 in which his Lordship held that a shortfall in area of a flat of 10.77% of the contractual area was a substantial misdescription under condition 11 which entitled the purchaser to a proportionate abatement on the purchase price for the whole of the shortfall.

The defendants' case is that the plaintiffs are not entitled to any compensation and if they are, the compensation is not a rateable refund of the purchase price but the difference between the market value of a flat of 2100 sq ft and one of 1754 sq ft. The defendants advanced the following arguments: (1) that as there was no breach of contract or warranty on the part of the defendants, no compensation could be claimed; (2) that the plaintiffs in completing the purchase had waived any right to compensation; (3) the misdescription by the defendants did not cause the plaintiffs any loss as it was made after the plaintiffs had completed the sub-purchase; and (4) that condition 11 was not fulfilled in that the market value of the flat (with an area of 1754 sq ft) was about $425,000 and therefore the misdescription was not of a serious nature nor did it affect the value of the flat. I shall now consider these defences.

Breach of Contract/Warranty

Counsel for the defendants contended that unless there was a breach of contract or a warranty, the plaintiffs were not entitled to claim compensation under condition 11, that the defendants had not breached any term of the sale agreement as they had not contracted

that the flat had an area of 2100 sq ft, or an area of 2100 sq ft "more or less", or "approximately 2100 sq ft" The latter two expressions were words of approximation (see the authorities cited in Emmet on Title 1986, para. 4.021) which were not used in the sale agreement. What the defendants had contracted with the plaintiffs was that the defendants had "estimated" the flat to be 2100 sq ft, which warranty had not been breached as the defendants had made such an estimate and the calculation showed it to be 2100 square feet.

The substance of this argument is based on the judgment of Watkin Williams J in *Joliffe v. Baker* [1883] 11 QBD 255. In that case, J, in response to an inquiry from B, replied that the land for sale was "in all three acres". B went to look at the land but it was never measured and a contract in writing was signed by the parties describing the land as "All that freehold cottage or tenement, garden and land containing by estimation three acres or thereabouts". Similar language was used in the conveyance to describe the property. After completion, B measured, the land and found that it contained 2a 1r 12p. B sued J for damages for misrepresentation. The Court held that, after completion, compensation could not be recovered for the shortfall, unless there was fraud or breach of contract or warranty contained in the conveyance. The Court held, on the facts, that the action was one for fraud and that there was no false representation as the initial representation was qualified both by the language of the contract and the conveyance. In dealing with the question of whether there was a breach of warranty, Watkin Williams J (who delivered the leading judgment of the Court) said (at pp. 273-274):

> Now in answering this question we must turn to the conveyance, and there we find the land described as two parcels, each defined in the most particular manner by metes and bounds and other details, and each "as containing, by estimation, one and a half acres or thereabouts.
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> It turned out when the lands came to be measured that the two parcels together amounted to only 2a. 1r. 12p. And the question is, does this amount to a breach of warranty as to quantity? It will be noted that the conveyance does not say "Containing by admeasurement so and so," but "containing by estimation so and so, or thereabouts." I am not aware that any exact definition has been judicially given to these words, although there have been several cases illustrating their meaning - for example, it has been held that a discrepancy of five acres out of forty-one was not so serious as to amount to a breach: *Winch v. Winchester;* on the other hand, a difference of 100 acres out of 349 was considered too serious to be covered by the qualifying expression: *Portman v. Mill.*
>
> I am not able to extract any principle from these cases, but I would venture to say that the real question is whether the parcels had or had not in truth and in fact been estimated to contain the quantity stated or thereabouts? If the discrepancy were very small there would be very little difficulty in believing that it might have been so estimated; if the error were very great the statement might be rejected as incredible; but still I would venture to say that in each case it is a question of fact whether the quantity had been so estimated or not, and by this I mean of course a **real genuine estimate**, and not a merely illusory one. Now what is the evidence upon the point in the present case? It appears that the defendant had himself bought the land by the description that it contained by estimation three acres or thereabouts, that he never measured it, and that he, in fact, believed it to be three acres; that the plaintiff himself saw the land and was content to take it at the estimated quantity, and believed it to amount to three acres, and there is nothing, except the bare fact of the error, to shew that this estimate was an irrational still less an impossible one. (Emphasis is mine)
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> I come to the conclusion upon these facts that the land had been actually and in fact estimated at three acres or thereabouts, and that the plaintiff, upon whom the onus of proof lay to establish the contrary, did not do so, and that there was consequently no breach of any warranty.

Counsel also submitted that this point was not taken by Counsel for the developers in Yeo Brothers.

Assuming that the word "estimated" was a warranty, what is the evidence that the defendants had made a genuine or *bona fide* or any estimate of the area? The defendants' witness, Cheong Wai Kun, who was a director of the defendants at the material time, testified that the defendants' intention was to sell the apartments at Prince Apartments at unit prices, that they had calculated their development costs and profits on that basis, that when they first fixed the prices they did not have the areas of the apartments, that when the apartments (which were then structurally completed) were released for sale, the defendants had to include the areas of the apartments for the purpose of the price list and the sale agreements. She also testified that she had requested one Chan Wai Kan (her father's assistant who died about 2 years ago) to work out the areas. She said that she did not check his calculations when fixing the sale prices. She, however, thought the calculations were reasonable estimates as the defendants had submitted to the planning authorities building plans for flats each with a 5-person density which, excluding the wash area and balcony, would have been about 1800 sq ft. When asked by her Counsel whether Chan had made his calculation on the basis of the dimensions of a typical floor as printed in the sales brochure (which stated the dimensions of the outside boundaries of the two flats on each floor to be 30.500 sq m x 12.800 sq m), she replied that he could have.

In my view, the evidence of Cheong on this point, even if true, proves that the defendants were in breach of their warranty. Cheong said she requested Chan to work out the area of the flat, which would either be the gross area or the net area. The floor plan in the sales brochure shows the layout of each of the two flats on the floor and the dimensions of the whole floor (including the common areas, viz., the lift shaft, the lift lobby and the staircase, and some air space) as 30.5 sq m x 12.8 sq m 390.4 sq m ("the brochure area"). The price list stated the area of each flat as "Approximate 195.2 sq m/2100 sq feet". Cheong said that Chan could have calculated the area of the flat by dividing the brochure area by two. Such a calculation would have given a gross area for each flat of 2100.35 sq ft. Given the dimensions of each floor as shown in the sales brochure, it must be obvious that if Chan made any calculation at all, he must have simply divided the brochure area by two. So, if Chan had been told to calculate the net area, then his estimate could only have been made recklessly, without having regard to the truth or, if done deliberately, deceitful. A *bona fide* calculation would not have thrown up the area of 2100 sq ft since the brochure area is larger than the gross area of each floor as each floor is not a perfect rectangle (the windows and the lift lobby/shaft having been set back). We now know that the scaled gross area of the flat is 2083 sq ft. Moreover, the gross area includes the common areas. So, if Cheong had instructed Chan to work out the gross area of the flat, the instruction was dishonest as Cheong, as a director, must or ought to have known that the common areas in a condominium development should not form part of the builtup areas of the apartments for the purpose of sale and that it would be fraudulent to include such areas as part of the flat for sale to purchasers.

Cheong admitted that she was aware of the area of each flat was approximately 1800 sq ft, excluding the wash area and balcony, and yet felt that it was reasonable for Chan to have estimated it at 2100. That must imply that she knew or ought to have known that the estimate was in respect of the gross area. Furthermore, if what she said about the defendants having decided to sell the apartments at unit prices without reference to area of the apartments was true, it would have not been necessary for her to request Chan to work out the areas at all since her estimated area of 1800 sq ft would be as good as any estimated area. For these reasons, I find it impossible to believe Cheong's evidence. In my view, either the defendants

did not make a genuine estimate or they deliberately did a fraudulent calculation of the area of the flat. I think that it is salutary to bear in mind that in *Joliffe v. Baker*, Watkin Williams J said that whether or not the parcels had been estimated was a question of fact, and that if the discrepancy were very small, there would be little difficulty in believing that it might have been so estimated, if the error were very great the statement might be rejected as incredible. His Lordship's words fit my assessment of Cheong's evidence.

Further, I do not agree with Counsel for the defendants on the effect of the word "estimated" when considered in the light of the compensation clause. In *Jollife v. Baker* the Court did not have to consider what effect a compensation provision might have on the words "by estimation". Where a contract of sale contains a compensation provision, compensation is, as Farwell J said in *Rudd v. Lascelles* [1900] 1 Ch 815 at 818, "part of the bargain". That being the case, it is, in my view, perfectly reasonable to construe the word "estimated", assuming it is a warranty, to mean that the defendants have estimated the area but that if a mistake is made, the plaintiffs will not be entitled to annul the contract or to compensation unless the estimation has resulted in a misdescription which is of a serious/vital nature or affects the value of the flat. If there is a doubt as to the ambit of the defendants' warranty, it should be construed in favour of the purchaser: see Lord Westbury in *Cordingley v. Cheeseborough* [1862] 45 ER 1230 at 1232. It would follow that even if the defendants had made a *bona fide* estimate of the area, the plaintiffs would still be entitled to compensation if the misdescription falls within the parameters of condition 11. "It is not necessary to show that the error or misdescription amounts to a warranty before a right of compensation arises under the present condition", per Peter Butt: Compensation for Errors or Misdescription in Contracts for the sale of Land: a New Approach in New South Wales [1983] 57 ALJ 93 at 100. If, of course, the vendor having warranted that he would estimate the area, fails to estimate the area or does it fraudulently, he may be sued for damages for breach of warranty, but that, in my view, does not preclude the purchasers from claiming compensation by way of abatement under a compensation provision, if they do not wish to claim damages for breach of warranty.

Waiver

The defendants' submission on waiver is as follows: the plaintiffs were aware of the misdescription before completing the purchase: they were offered "rescission" or completion without abatement: they attempted to force the defendants to complete with abatement which they were not entitled to under the law, where the misdescription was substantial: also the plaintiffs could have applied to Court for relief before completion but they did not, and this obligation to do so was recognised by Lai J in *Yeo Brothers:* the plaintiffs finally chose to complete the purchase, and therefore, notwithstanding their attempt to preserve their right to claim for compensation by completing with a reservation, they must now be taken to have waived their claim for an abatement. Further, no action may be brought for breach of contract after completion as the obligation in the contract merges the obligation into the conveyance: the misdescription therefore cannot survive the completion. The defendants could only transfer what they had to transfer, and the plaintiffs by taking what the defendants could transfer cannot now say that the contractual obligation is capable of fulfillment after completion. Counsel relied on *Joliffe v. Baker and Clayton v. Leach* [1889] 41 Ch D 103.

I am unable to accept this argument for the reasons that follow. Firstly, on a question of fact, I have already pointed out earlier that the defendants did not offer the plaintiffs rescission with a full refund of the progress payments. The plaintiffs were given a Hobson's choice.

Secondly, Lai J in *Yeo Brothers* did not recognise and could not have recognised any principle that an application for relief must be made before completion in the circumstances of that case as the question did not arise in that case. His Lordship was not dealing with the case of an open contract or a contract for the sale of land without a compensation provision. In a contract of sale which contains a compensation provision, like condition 11, different considerations apply.

Thirdly, the argument that the plaintiffs were not entitled to force completion on the defendants with abatement is incorrect if it is unqualified. Even in an open contract, equity has allowed the purchaser to take what the vendor can give with compensation for errors and misdescription subject to no unacceptable hardship being inflicted on the defendants by reason of such compensation. The position is clearly summarised by the Privy Council in *Rutherford v. Acton-Adams* [1915] AC 866 PC, (at pp. 869-870) as follows:

> In exercising its jurisdiction over specific performance Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor had not, by mispresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing the Court holds him to have an even later right. *Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject-matter described in the contract.* It does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract. (Emphasis is mine)

Fourthly, the decisions of *Joliffe v. Bar* and *Clayton v. Leach* are not applicable here as they were concerned with claims for abatement where there were no compensation provisions:

> In such cases, the equitable right to abatement or compensation is merely ancillary to relief by way of specific performance. If the parties have proceeded to completion and have not expressly or impliedly reserved rights to compensation or an abatement, the basis for relief is ordinarily regarded as an end. Conversely, the compensation may be recoverable after completion if there has not been merger or waiver. - See *Spry Equitable Remedies* 1984 at p. 298.

In cases of claims made under compensation provisions, the question is one of construction: see *Spry ibid*, and *Palmer v. Johnson* [1884] 13 QBD 351 (in which the Court of Appeal disapproved of the judgment of Watkin Williams J in so far as it departed from the decision of *Bos v. Helsham* [1866] LR 2 EX 72) has construed such a compensation provision to allow for claims even after completion. No doubt, in *Palmer v. Johnson*, the error was discovered **after** the conveyance was taken unlike the present case where the error was discovered **after** the contract of sale was entered into but **before** completion, and this distinction has provided the defendants with another strand in their submission that the plaintiffs, in completing in those circumstances, had waived their right to compensation. I do not agree. Waiver is a question of fact and sometimes of law. In fact, the intention of the plaintiffs was absolutely clear. They demanded completion with an abatement and when they were rebuffed and threatened with default, they decided to complete after reserving their right to claim an abatement after completion. On the other hand, the intention of the defendants was wholly irrelevant as, in law; they were not at that time entitled to force completion against the

plaintiffs without offering an abatement. Not only did they not offer an abatement, they threatened the plaintiffs with the consequences of a breach of contract for failing to complete, as a result of which the plaintiffs completed with a reservation of their rights. In these circumstances, I find it quite impossible to hold that there was any waiver by the plaintiffs.

Fifthly, the defendants have cited no authority to show that the reservation by the plaintiffs of their rights to compensation before they were compelled to complete on the defendants' terms was extinguished by the completion. On what legal basis was it extinguished? The doctrine of merger cannot apply unless the parties intend that there be merger in such circumstances or the law requires it. Where a party has reserved his claim, there is no justification for a rule of law that he must determine his claim first before completing the purchase. Why should it make any difference to the law whether the claim is determined before or after completion? Indeed, it would, in my view, be completely unjust to apply such a rule in this type of situation as, inevitably, the purchaser would never be able to obtain his relief in time to allow him to complete without abatement if he fails in his application. The object of condition 11 is to give equal contractual rights to the vendor and the purchaser in terms thereof. It is not intended to give rise to a "heads I win and tails you lose" situation in favour of the plaintiffs.

For the above reasons, I reject the defendants' case on waiver.

Causation

The defendants' defence on this ground is as follows: when the sale agreement was signed between the plaintiffs and the defendants, the plaintiffs had already completed the purchase of the flat on a sub-sale from the original purchasers: any loss suffered by the plaintiffs by reason of the shortfall was suffered as a result of the sub sale and not as a result of any sale by the defendants or by their signing the sale agreement. In short, there was no causal link between the loss and the misdescription. Counsel referred to *Chitty on Contracts* at p. 734 para. 1564 and *Sykes v. Midland Bank Executor and Trustee Co. Ltd.* [1971] 1 QB 113.

This argument also has no merit. Not only is it not supported by the evidence, it is also irrelevant. The evidence is that the plaintiffs completed their purchase from the original purchasers on or about 9 January 1984 when all necessary documents and cheques were exchanged. However, the defendants' professional surveyor had on or about 30 November 1983 already prepared a survey plan (P1) for submission to the planning authorities for the preparation of certificates of title. So the defendants must have known at about that time that the correct area of each flat was 163 sq m and not 195.2 sq m. If they had then informed the plaintiffs of the correct area, the plaintiffs might have been able to rescind the sub-purchase or complete it with compensation from the original purchasers. Instead, the defendants did not disclose this fact and thereby induced the plaintiffs to complete the sub-purchase on the basis of an incorrect area. In my view, there was a causal link between the misdescription and the right to compensation.

In any event, the argument on causation is not relevant to the plaintiffs' claim. Although the sale agreement forms the basis of the plaintiffs' claim, their rights are, in substance, derived from the deed of assignment and not from the sale agreement. Even without the sale agreement, the plaintiffs, as assignees of the benefit of the agreement of sale were entitled to claim against the defendants for compensation. By reason of r. 17 of the Housing Developers Rules 1976-81, the sale agreement did nothing more than to substitute the plaintiffs as the original purchasers. There was in effect a novation. The argument on causation therefore fails.

Condition 11

Counsel for the defendants contended that the misdescription of the area of the flat, although substantial, was not of a serious or vital nature and did not affect the value of the flat. Counsel also contended that in *Yeo Brothers* Lai J had decided, correctly, that the plaintiffs must show that the misdescription (i) must be of a serious or vital nature **and** (ii) considerably affecting the value of the property, before condition 11 could be invoked. I have found nothing in the judgment of Lai J which suggests that this argument was raised before his Lordship. In that case, the parties were concerned with whether the shortfall of 10.77% in the area of the apartment was a substantial misdescription and Lai J said that "the two criteria which take a misdescription outside the ambit of Clause 11 are, in effect, the same as the concept of "substantial misdescription". I take his Lordship's view to mean that, on the facts of that case, the shortfall was of a serious/vital nature and considerably affected its value. His Lordship did not have to decide it was one or the other since it was both. It does not follow from this that he construed condition 11 as requiring both conditions to be satisfied. In my view, condition 11, on its ordinary construction, means that neither party shall be entitled to compensation for any misdescription if it is **neither** of a serious/vital nature **nor** considerably affecting the value of the property. Accordingly, if it is one or the other (assuming that the words "serious" and "vital" describe the same condition) then either party is entitled to compensation. If the words "serious" and "vital" describe different conditions, then the fulfillment of any one of the three conditions entitles the relevant party to compensation. Some errors and misdescription are serious or vital without affecting the value of the property whilst some affect the value of the property without being serious or vital. It depends on the nature of the error or misdescription.

In any case, I am of the view that in the context of Singapore, a shortfall of 16.47% of the built-up area of a flat is **both** of a serious nature **and** considerably affecting the value of the property. Condition 11 has existed in Singapore for a long time. It was construed by a Singapore Court in 1930 in *Re Elphick and Gaw* [1930] SSLR 199. In that case, the purchasers agreed to buy for development a plot of land with an "approximate" area of 28 acres in Bukit Tunggal. The actual area was about 2 acres short (about 7.5%) and the vendors refused abatement on the ground that it was not a serious error under conditions 11. The vendors argued that they sold the land as residential property and not as building lots and that it was sold for a lump sum. The purchasers refused to rescind and demanded completion with abatement. They said that they would not have bid so much had they known of the error. Stevens J, in his judgment said (at pp. 208-209):

> The third point concerns the construction of Singapore condition No. 11. It is clear that but for the insertion of the words "not of a serious or vital nature nor considerably affecting the value of the property" this condition would have afforded complete protection to the vendors (see *Terry & White's Contract*), unless the misdescription was such as to strike at the whole basis of the contract, so that the parties could not be said to be ad idem. It was contended on behalf of the vendors that the words I have quoted were intended to relate to a misdescription of that nature. But I am of opinion that these words must be construed in their natural meaning. The opposite of the word "serious" is "trivial", and of "considerable", "inconsiderable" or "unimportant". In my opinion the distinction made by these words is between misstatements that are of serious consequence to the purchasers and those that are of trivial consequence. It is, of course, impossible to draw a hard and fast line between the two classes of misstatements, and what I have to determine in this case is whether the loss of rather more than 2 acres out of 28 acres is a trivial or serious loss. Now it is true that the value of the property purchased depends in a large measure on its site and its extensive road frontage, but those advantages are of value only in relation to the area of land which enjoys them, and I cannot bring myself to hold that the loss of about eight per cent of that area, to

a buyer who purchases with the intention of developing the site on a commercial basis, is a matter of trivial consequence. In my opinion, it is sufficiently serious to bring it within the meaning of the words quoted above. I therefore hold that condition No. 11 does not in this case protect the vendors.

If, in 1930 in Singapore, a 7.5% shortfall in an area of 28 acres of undeveloped residential land was of a serious nature and considerably affecting its value, the case of a l6.47% shortfall in the built up area of a flat in 1982 is a *fortiori*. In *Yeo Brothers*, the shortfall was only l0.77% of the estimated area. However, Counsel for the defendants has contended otherwise and this leads me to his next submission.

Value of Flat and Calculation of Abatement

The defendants' contentions are (1) the flat, even with the reduced area of 1754 sq ft, had a market value of about $420,000 in August 1981 and about $450,000 in August 1983 and therefore the misdescription was not of a serious or vital nature nor did it considerably affect its value, and (2) the compensation, if any, should not be based on a proportionate abatement but on the difference between the market value of a flat of 2100 sq ft and one of 1754 sq ft.

The plaintiffs' case is that they have suffered a loss for which they are entitled to be compensated by way of a proportionate abatement on the purchase price of $425,000 on the basis that the flat was sold to them and they purchased the flat by reference to its price on a per square foot basis and that accordingly the diminution in value should be measured in the same way by reference to the amount of the shortfall.

The first issue is one of fact and the second is one of mixed law and fact. Both parties called experts to testify. The 2nd plaintiff himself testified that prior to buying the flat he was living with his mother in a HDB flat. When he got engaged to the 1st plaintiff, he decided to move into a bigger flat. He saw a "for sale" advertisement in the Straits Times in respect of the flat and was told by the agent that it was 2100 sq ft. After inspecting the flat, he negotiated with the agent on the price and eventually agreed on $460,000 as he thought $216 psf was a reasonable price. He said he would not have bought the flat at that price if he had known it was 1754 sq ft, and that he would have negotiated for a lower price. As far as he was concerned he calculated the price of the flat on a per square foot basis.

The plaintiffs' other witness, one Lim Choo Siang, was a professional valuer of about 12 years experience. He testified that in Singapore flats and other properties were advertised for sale and sold by reference to its area. He produced a number of advertisement published by a number of real estate developers in Singapore. He was of the view that the price of about $260 psf ($460,000 divided by 1754 sq ft) for the flat in the Balestier area was on the high side as there were bigger flats in better locations for sale at lower prices on a psf basis. He referred to flats at Clementri Part, Yong An Park and Cairnhill Road where they were sold at between $222-$254 psf in the latter part of 1984, when property prices were declining as measured by the Property Price Index. He assessed the diminution in value of the flat at about $220 psf and was also of the view that an arithmetical calculation was consistent with established valuation practice.

The defendants' witness, Cheong, agreed that a shortfall of 16.47% of the area was substantial but said that the defendants sold it on a unit basis and not on an area basis. She testified that the defendants had calculated their development costs and profits on that basis. In my view, if her evidence were true, it would be the easiest thing for the defendants to produce documentary proof of such intention and of the calculations they had purportedly made. They did not offer to produce such proof (and here I have taken into account the omission of Counsel for the plaintiffs to ask for such proof) even though they had put forward this

defence at a time when the documentary evidence would have been available i.e., at a time when they had not closed their accounts in respect of this development. The evidence of Cheong was nothing more than an assertion and I do not accept it. Since the defendants developed the Prince Apartments not for long term investments but for sale, I must assume that the defendants would, like all real estate developers, have wished to maximise their profit on the development. This would mean embarking on a development with the highest permitted plot ratio and the most appropriate type of flats for the location and the potential purchasers. However the defendants did their sums, they must ultimately need to know the areas of the flats for the purpose of comparing with other flats that were being offered for sale by other developers. In order to sell the flats, the defendants must know whether the prices they are offering are within the range of market prices for comparable flats offered by other developers. I am unable to understand how the defendants could have fixed a saleable or competitive price without reference to the price per sq ft.

a *b* *c*

However, if I am wrong in not believing Cheong's evidence, I am of the view that as the defendants have stated the estimated areas of the flats in the price list, they must be presumed, until the contrary is proved, to have fixed the prices having regard to the areas of the flats. In this respect, I also do not believe Cheong's evidence that the areas were included in the price list because they had to. In my view, they had to because they had to persuade prospective purchasers that they would be getting a fair market price for the flats of those dimensions, as it was and is common knowledge that every prospective purchaser, and for that matter, every valuer would and does calculate the market value of a flat by reference to its area. There was and is no law that a price list must set out the areas of the units. If the defendants had intended to sell at unit prices without reference to the areas of the flats, they could have done so in a way which did not mislead the purchasers. At it was, the price list was grossly misleading. In my view, the more assertion of the unilateral intention on the part of the defendants is insufficient to rebut the presumption against them.

d *e*

In regard to the market value of the flat, the defendants called an expert witness, one Miss Ng Poh Chue. She graduated with a degree (B Sc (Estate Management)) in 1985 and has since worked with a firm of professional valuers. She was a student when the flat was sold. She produced a valuation report showing that the open market values of the flats in Prince Apartments (on the basis of the flats having an area of 1754 sq ft and not 2100 sq ft). The figures are as follows:

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(1) August 1981 - $420,000 to $430,000

(2) August 1983 - $465,000 to $475,000

(3) August 1984 - $445,000 to $455,000

g

(4) August 1985 - $410,000 to $420,000

Her report stated that she had arrived at the above prices by taking into account the following factors: (a) a willing seller and a willing buyer; (b) the nature of the property and the prevailing state of the market; (c) the property will be freely exposed to the market; (d) no account is to be taken of an additional bid by a special purchaser. Her report also stated that in assessing the open market value of the subject property, she had taken into consideration the market condition and the sales of similar properties, i.e., comparable sales to assess the market value of the flat. She also referred to a direct comparable, i.e, Flat #08-02 in Prince Apartments for which an option dated 8 March 1984 was given at the price of $490,000. However, she did not say whether the said flat was actually sold at that price or what the area was that was stated in the option. She also referred to the trend in property prices for the period 1981-1985 as shown in the Property Price lndex.

h *i*

In her oral evidence she elaborated on her written report. She agreed that a shortfall of 32.2 sq m was a substantial shortfall and that if she, as a valuer, had to make an adjustment to the sale price, she would have adjusted it downwards from 5-8%. She was unable to explain how she arrived at that range of adjustment except to assert that there was such a practice amongst valuers in Singapore. She referred to two comparables in the Balestier district which showed a 10% difference in price for a comparable difference in their built up areas, but when she was asked by Counsel whether a 16.5% rebate would be within a valuer's judgment on her comparable, she was unable to give an opinion on the matter.

I do not find it necessary to examine Miss Ng's evidence in detail. I note, however, that her valuation report did not state a market value of the flat for August/November 1982. This is a curious omission. In any case, on the basis of her valuation report and the Property Price Index, the market value would not have been less than $420,000. In fact, of course, the market value of the flat was $425,000 in November 1982 as that was what it was sold for. It is generally agreed that the market value of any property is the price at which a willing seller is prepared to sell and a willing buyer is prepared to buy that there is no unusual distortions in the market. It is also an established valuation principle that the best evidence of the market price of a property is the price at which it is actually sold and not what a valuer says or thinks it should be sold. In *S.N. Aswani v. Collector Of Land Revenue* [1982] 2 MLJ 104, the Chief Justice, in delivering the judgment of the Court of Appeal, said (at p. 105):

> It is settled law that the compensation to be awarded for land acquired under the Act must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser and that what is meant in general by the expression "market value" in the Act is that its value in general can be measured by a consideration of the prices that have been obtained for land of similar quality and in similar positions.
>
> It follows, as a self-evident proposition, for which no authority is necessary, that where there has been a sale of the acquired land shortly before its acquisition on a willing vendor, willing purchaser basis, then its "market value" must primarily be measured by the price obtained by that willing vendor. In other words, the price obtained by the willing vendor from the willing purchaser at a recent sale of land must be the best evidence of the "market value" of the identical land at the date of its acquisition.

Having regard to the established fact that the market value of the flat as at November 1982 as evidenced by its transacted price of $425,000, the evidence of Miss Ng on the market value of the flats in Prince Apartments on other dates does not assist me in this case. In the present case, the defendants sold the flat with an estimated area of 2100 sq ft at the price of $425,000. They were willing sellers and the original purchasers were willing buyers of the flat with that stated area in an open competitive market for flats. Both parties acted in that belief. The defendants did not purport to sell a flat of 1754 sq ft and the original purchasers did not purport buy a flat of 1754 sq ft. Having sold the flat, with a stated area estimated to be 2100 sq ft at the price of $425,000, how can the defendants now say or be permitted to say that was the market value of a flat of 1754 sq ft?

Counsel for the defendants contends that that is what the expert evidence shows. With respect, I do not agree. In the context of this case, the valuation report of Miss Ng is nothing more than an exercise in fiction in regard to the market value of the flat as at November 1982. On 10 November 1982, there was no willing seller and no willing buyer of the flat or any other flat in Prince Apartments with an estimated area of 1754 sq ft at the price of $425,000. There was an actual willing seller and actual willing buyer of the flat with an estimated area of 2100 sq ft at $425,000. The same comment is applicable to her valuation for

August 1983 in respect of the flat. The original purchasers were willing sellers and the plaintiffs were willing buyers of the flat (with an estimated area of 2100 sq ft) at $460,000 in September 1983.

Counsel for the defendants also submitted that at the date of completion in August 1984 the flat was worth about $490,000 (as there was an option given for $490,000 in March 1984 for an identical flat on the 8th Floor) and that was why the plaintiffs did not accept the defendants' offer of "rescission". I do not think that there is any substance in this argument for the reasons following. Firstly, there is no evidence that the area stated in the option was 1754 sq ft or that the said option was exercised. Secondly, the plaintiffs had no way of knowing that there was an option for $590,000 in respect of the said flat. Thirdly, as I have found, there was no offer of rescission. Fourthly, if any other party in this action had knowledge, it could only have been the defendants. Fifthly, if the defendants themselves believed that the flat of 1754 sq ft was worth $490,000 or even the market value of $445,000 - $455,000 as assessed by Miss Ng, there was no commercial reason for them not to accept the plaintiffs' offer to sell the flat back to them at $425,000, taking into account the fact that they had the use of the bulk of the purchase price for some time. Quite clearly, the defendants themselves did not believe it, and if Miss Ng had advised them of her valuation at that time, it would have been probable that they would not have believed it either.

For the above reasons, I reject the submission that the error or misdescription did not affect the value of the flat.

I turn now to the question of abatement. Counsel for the defendants referred to a passage from the judgment of Helsham CJ in *Ownist Pty. Ltd. v. Twyman Pastoral Co. Pty. Ltd.* [1983] 2 NSWLR 196 at p. 198 as follows:

> Normally, I suppose, a compensateable misdescription of a property arising from deficiency of area is conveniently assessed by simple calculation. It may be the only sensible way of making such an assessment in contracts that lend themselves to that sort of approach. But if one bears in mind that it is the diminution in value that the standard condition is directed at and that compensation is really to provide recompense to a purchaser for what he did not get as a result of the misdescription or error, that the false approach, of merely choosing between two acreages is demonstrated.

I agree with the observations of Helsham CJ on the principle of compensation. But they do not help the defendants in the present case. I have already found that they have produced no evidence whatever that there was no diminution in the value of the flat by reason of the shortfall. The only question I have to decide now is how is the compensation to be calculated. In the absence of any evidence of diminution in value, it is my view that the compensation should be by way of proportionate abatement. In *Hill v. Buckley* [1811] 17 Ves 394, the Master of the Rolls said (at pp. 401-402):

> Where a misrepresentation is made to the quantity, through innocently, I apprehend, the right of the purchaser to be to have what the vendor can give; with an abatement out of the purchaser-money for so much as the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price regard was had on both sides to the quantity, which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain: therefore a rateable abatement of price will probably leave both in nearly the same relative situation, in which they would have stood, if the true quantity had been originally known.

Similarly, Fry J applied a proportionate abatement of the rental payable for a leased property which was less than what was contracted to the lessee in *McKenzie v. Hesketh* [1877] 7 Ch D 675.

Where a purchaser is entitled to compensation, the general principle is that the purchaser is entitled to be put as nearly as possible into the position he would have enjoyed had he obtained the land contracted to be sold without the error or misdescription. In the present case, the plaintiff did not get 2100 sq ft which he had bargained for. He has to be compensated for his loss of 346 sq ft of built up space. Since the defendants have set a price of $425,000 for 2100 sq ft of built up space in a flat, there is no reason why I should not apply the general rule referred to by the Master of the Rolls in *Hill v. Buckley*. To adopt his Lordship's words, "a rateable abatement of the price will probably leave both in nearly the same relative situation, in which they would have stood, if the true quantity had been originally known."

When a developer sells a flat, he is not selling four walls of concrete nor is the purchaser buying four walls of concrete with a ceiling. He is selling and the purchaser is buying **living** space. Every square foot counts to a purchaser as that is what he is buying. Moreover, he is paying a relatively high price for such living space. There is also authority for the rule that where the parties have set higher values upon some parts of the property than upon others, a proportionate abatement is not strictly appropriate and account is taken of the value of the particular part or parts of the property not available to the purchaser: see Peter Butt, 102 *ibid*, and also *Hill v. Buckley*. In the case of a flat, some parts of it may well be of less value than other parts, but in the absence of any evidence to the contrary, I can only apply a rateable abatement.

I am also unable to accept Miss Ng's evidence that the abatement should be 5%-8% of the purchase price. I do not accept her evidence on the existence of a practice amongst valuers of adjusting discrepancies in built up areas of flats by 5-8% is satisfactory as expert evidence. If there were such a practice, I do not think that it should be applied in the present case without evidence justifying first the correctness of that range of adjustment for flats and second its application to discrepancies in areas of flats in the range of 1700-2100 sq ft. Miss Ng has not said that the general rule that the larger the land the lower the price per square foot is generally applicable to flats.

For the above reason, I allow the plaintiffs' claim of $70,023.80 by way of proportionate abatement on the purchase price of $425,000, with interest thereon at the rate of 6% pa from the date of completion up today, and costs to be taxed. There will also be similar orders for such amounts as are appropriate in suits nos 1660/85, 1662/85, 1668/85, 1688/85, 1689/85, 1690/85, 2027/85, 2028/85 and 3208/85.

Also found at [1990] 1 CLJ 1253